

1 SEAN C. CUNNINGHAM, Bar No. 174931
2 sean.cunningham@dlapiper.com
3 KATHRYN RILEY GRASSO, Bar No. 211187
4 kathryn.riley@dlapiper.com
5 DAVID R. KNUDSON Bar No. 265461
6 david.knudson@dlapiper.com
7 **DLA PIPER LLP (US)**
8 401 B Street, Suite 1700
9 San Diego, CA 92101-4297
10 Telephone: 619.699.2700
11 Facsimile: 619.699.2701

12 TODD S. PATTERSON (*pro hac vice*)
13 todd.patterson@dlapiper.com
14 **DLA PIPER LLP (US)**
15 401 Congress Avenue
16 Suite 2500
17 Austin, Texas 78701-3799
18 Telephone: 512.457.7000
19 Facsimile: 512.457.7001

20 Attorneys for Defendant and Counterclaim Plaintiff
21 SOPHOS INC. and Counterclaim Plaintiff SOPHOS
22 LTD.

23 **UNITED STATES DISTRICT COURT**
24 **NORTHERN DISTRICT OF CALIFORNIA**
25 **SAN FRANCISCO DIVISION**

26 FORTINET, INC., a corporation,

27 Plaintiff,

28 v.

29 SOPHOS INC., a corporation, MICHAEL
30 VALENTINE, an individual, and JASON
31 CLARK, an individual,

32 Defendants.

CASE NO. 3:13-cv-05831-EMC

**NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT BY
DEFENDANTS SOPHOS INC., MICHAEL
VALENTINE AND JASON CLARK**

Date: October 8, 2015
Time: 1:30 pm
Place: Courtroom 5, 17th Floor
Judge: Edward M. Chen

ORAL ARGUMENT REQUESTED

33 SOPHOS INC. and SOPHOS LTD.,
34 corporations,

35 Counterclaim Plaintiffs,

36 v.

37 FORTINET, INC., a corporation,

38 Counterclaim Defendant.

1 **NOTICE OF MOTION AND MOTION**

2 TO PLAINTIFF FORTINET, INC (“FORTINET”) AND ITS COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on October 8, 2015 at 1:30 p.m., or as soon thereafter as
4 the matter can be heard, in the courtroom of the Honorable Edward M. Chen, located at 450
5 Golden Gate Avenue, San Francisco, California, 94102, there will be a hearing on the motion of
6 Defendants Sophos Inc. (“Sophos”), Michael Valentine and Jason Clark for summary judgment
7 on the grounds that there exists no genuine issue of material fact on the following claims: (1)
8 Fortinet’s claim for trade secret misappropriation against Sophos (Count No. XI of Fortinet’s
9 First Amended Complaint); (2) all claims alleged against individual defendants Michael
10 Valentine and Jason Clark (Count Nos. VII, VIII, IX, X, XII and XIII of Fortinet’s First Amended
11 Complaint); and (3) Fortinet’s claim for pre-suit damages on two of its asserted patents, United
12 States Patent Nos. 7,333,430 (“the ’430 patent”) and 7,376,125 (“the ’125 patent”).

13 This motion is based on this Notice of Motion, the Memorandum of Points and
14 Authorities below, the Declaration of Sean C. Cunningham (“Cunningham Decl.”) in support of
15 this Motion and the exhibits attached thereto, the complete record in this action, all matters of
16 which the Court may take judicial notice, and such other written or oral argument as may be
17 presented at or before the time this Motion is taken under consideration by the Court.

18 **RELIEF REQUESTED**

19 Defendants respectfully request summary judgment be entered in their favor on (1)
20 Fortinet’s claim for trade secret misappropriation against Sophos (Count No. XI of Fortinet’s
21 First Amended Complaint); (2) all claims alleged against Defendants Michael Valentine and
22 Jason Clark (Count Nos. VII, VIII, IX, X, XII and XIII of Fortinet’s First Amended Complaint);
23 and (3) Fortinet’s claim for pre-suit damages on two of its asserted patents, the ’430 patent and
24 the ’125 patent.

1 Dated: September 7, 2015

DLA PIPER LLP (US)

2

3

By: /s/ Sean C. Cunningham

4

SEAN C. CUNNINGHAM
KATHRYN RILEY GRASSO
DAVID R. KNUDSON
TODD S. PATTERSON

5

6

Attorneys for Defendant and Counterclaim
Plaintiff SOPHOS INC. and Counterclaim
Plaintiff SOPHOS LTD.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Defendants request summary judgment on the following three grounds. First, no genuine
4 issue of material fact exists on Fortinet's claim against Sophos for trade secret misappropriation,
5 because Fortinet has failed to identify any information that qualifies as a trade secret under
6 California law and because Fortinet has no evidence that Sophos acquired any alleged Fortinet
7 trade secrets through improper means. Second, all of the claims against Michael Valentine and
8 Jason Clark should be dismissed, because those claims were fully adjudicated and resolved in a
9 Court-ordered arbitration earlier this year. Third, the Court should enter summary judgment on
10 Fortinet's claim for pre-suit damages on two of its asserted patents, because Fortinet practices the
11 claims of those patents but failed to mark its products with the patent numbers as required by 35
12 U.S.C. § 287.

13 **II. BACKGROUND AND STATEMENT OF FACTS**

14 Fortinet filed this lawsuit against Sophos and Michael Valentine on December 16, 2013,
15 accusing Sophos of patent infringement and accusing Mr. Valentine, a former Fortinet Senior
16 Vice-President who left Fortinet for Sophos, of breach of his employment agreement for allegedly
17 soliciting other Fortinet employees to join him at Sophos. Dkt. No. 1. Fortinet filed this lawsuit
18 in response to several employees leaving Fortinet for Sophos. *Id.* at 6. On January 9, 2014,
19 following the departure of several more Fortinet employees for Sophos, Fortinet filed a First
20 Amended Complaint, added Jason Clark as a defendant and pled a bevy of other allegations,
21 including a claim for trade secret misappropriation against Sophos, as well as additional
22 solicitation claims against Mr. Valentine and Mr. Clark. Dkt. No. 9.

23 Because Fortinet had included an arbitration provision in its employment contract with
24 Mr. Valentine, Mr. Valentine moved to compel arbitration as to the claims asserted against him.
25 The parties ultimately stipulated to arbitrating the claims against Mr. Valentine and Mr. Clark,
26 and the Court thereafter ordered all of the claims against Mr. Valentine and Mr. Clark to
27 arbitration. Dkt. No. 45. A week-long arbitration hearing was held before the Hon. Jack Komar
28 at JAMS from November 10-17, 2014. Following post-hearing briefing, Judge Komar issued a

1 Final Award on March 10, 2015, which disposed of all of Fortinet's claims against Mr. Valentine
2 and Mr. Clark.

3 Shortly after Fortinet filed its trade secret misappropriation claim, Sophos demanded that
4 Fortinet identify its alleged trade secrets with particularity, as Fortinet was required to do
5 pursuant to California Code of Civil Procedure § 2019.210 before commencing discovery on its
6 misappropriation claim. Fortinet initially refused to provide a § 2019.210 statement, but did so
7 on August 5, 2014 after Sophos informed Fortinet that Sophos would move to compel the
8 identification. Fortinet's initial § 2019.210 statement mirrored Fortinet's previous response to a
9 Sophos interrogatory seeking the identification of Fortinet's trade secrets, which was woefully
10 inadequate and failed to comply with the requirements of the statute. Fortinet's initial § 2019.210
11 statement listed only categories and types of information that Fortinet alleged to be trade secrets,
12 and did not identify any specific document alleged to have been misappropriated. After Sophos
13 objected, Fortinet amended its § 2019.210 statement on September 8, 2014 but again, the
14 identification failed to comply with the requirements of the statute. With the arbitration hearing
15 looming, Fortinet's lead counsel promised not to "back burner" providing an adequate § 2019.210
16 statement, but that is exactly what happened. Fortinet ultimately abandoned its trade secret
17 breach of contract claims against Mr. Valentine and Mr. Clark in the arbitration, and did not
18 resume pursuing its trade secret claim against Sophos until March 2015, when Fortinet sought to
19 inspect the computers of the former Fortinet employees.

20 Fortinet served a second amended § 2019.210 statement on May 1, 2015, nearly 14
21 months after it filed its trade secret misappropriation claim. Because the fact discovery period
22 was rapidly coming to a close, Sophos accepted the statement for the purpose of completing
23 discovery, but Sophos reserved all rights to challenge the sufficiency of the § 2019.210 statement
24 for all other purposes, including summary judgment.

25 Failing to identify its alleged trade secrets in litigation is becoming a pattern for Fortinet.
26 In a very similar case brought against another competitor (FireEye, Inc.), Fortinet recently found
27 itself on the losing end of a motion for protective order for its failure to identify its trade secrets
28 with particularity. *See Fortinet, Inc. v. FireEye, Inc.*, No. 3:13-cv-02496-HSG-PSG, Dkt. No.

1 173 (Aug. 24, 2015 Order Granting FireEye’s Motion for Protective Order). Fortinet’s failed
2 identification of its alleged trade secrets in that case is nearly identical to its failed identification
3 of its alleged trade secrets in this case. *Compare* Case No. 3:13-cv-02496 at Dkt. No. 114, Ex. A
4 to Decl. of Shane Brun *with* Cunningham Decl., Ex. 1.¹

5 Because Fortinet could not identify any trade secrets purportedly misappropriated by
6 Sophos when Fortinet filed its First Amended Complaint, it embarked on a fishing expedition
7 during discovery to try to “reverse engineer” what it believed had been misappropriated. Fortinet
8 ultimately gained access to the forensic images of all of the former Fortinet employees’ personal
9 and work computers, and by running extremely broad search terms (such as “Fortinet” +
10 “confidential” in the same document) was able to generate thousands of “hits” which it used to
11 cherry-pick certain documents it then claimed were its misappropriated trade secrets.

12 For purposes of this motion, therefore, the material facts are: (1) Fortinet has not
13 identified any alleged trade secret with the particularity required by California law, and it is too
14 late to do so now; (2) there is no evidence that Fortinet took reasonable measures to maintain the
15 secrecy of its alleged trade secrets; (3) there is no evidence that Sophos obtained any alleged
16 Fortinet trade secret by “improper means” or that Sophos misappropriated any alleged Fortinet
17 trade secret; (5) there is no evidence that Fortinet has been damaged by any alleged trade secret
18 misappropriation; (6) there are no remaining claims to be adjudicated against Mr. Valentine and
19 Mr. Clark because those claims have been resolved through arbitration; and (7) Fortinet did not
20 provide Sophos with the requisite notice to be entitled to seek pre-suit damages for two of
21 Fortinet’s asserted patents.

22 **III. LEGAL STANDARD FOR SUMMARY JUDGMENT**

23 Under Federal Rule of Civil Procedure 56(a), the Court must grant summary judgment to
24 a moving party when the “movant shows that there is no genuine dispute as to any material fact
25 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). If, as here, a
26 non-moving party bears the burden of proof, the Court should grant summary judgment if there is

27 ¹ Unless otherwise noted, all exhibits cited in this Motion are attached to the Declaration of Sean
28 C. Cunningham filed with this Motion and are cited as “Ex. #.”

1 a “complete failure of proof concerning an essential element of the nonmoving party’s case.”
2 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citations omitted). To oppose summary
3 judgment, a non-moving party “may not rest upon the mere allegations or denials of his pleading,
4 but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v.*
5 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

6 **IV. THE COURT SHOULD GRANT SUMMARY JUDGMENT ON FORTINET’S**
7 **CLAIM FOR TRADE SECRET MISAPPROPRIATION AGAINST SOPHOS.**

8 The Court should grant summary judgment on Fortinet’s claim for trade secret
9 misappropriation under the California Uniform Trade Secrets Act (“UTSA”), Count No. XI of its
10 First Amended Complaint. To prevail on a trade secret claim under the UTSA, a plaintiff must
11 establish that it owns a clearly identified trade secret, that the defendant acquired, disclosed, or
12 used the plaintiff’s trade secret through improper means, and that the misappropriation caused
13 damage to the plaintiff. *Mintz v. Mark Bartelstein & Assoc., Inc.*, 906 F. Supp. 2d 1017, 1038
14 (2012); Cal. Civ. Code § 3426.1; *see also Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th
15 1658, 1665 (2003). For at least four independent reasons, the Court should enter summary
16 judgment on Fortinet’s trade secret claim. First, Fortinet has not identified any information that
17 constitutes a legally protectable trade secret as defined in the UTSA—not in deposition
18 testimony, not in interrogatory responses, not in expert reports, and certainly not in its “Second
19 Supplemental Identification of Trade Secrets Pursuant to Cal. Code of Civ. Proc. § 2019.210.”
20 Ex. 1. Second, Fortinet has not proven that its purported trade secrets (whatever they may be)
21 were the subject of efforts that are reasonable under the circumstances to maintain their secrecy.
22 Third, Fortinet has not proven that Sophos misappropriated any alleged Fortinet trade secret
23 through “improper means.” Fourth, Fortinet has not proven it suffered any actual loss from any
24 alleged misappropriation, or that Sophos was unjustly enriched as a result of any alleged
25 misappropriation.

26 **A. Summary Judgment Is Warranted Because Fortinet Has Not Identified Any**
27 **Information That Constitutes A Legally Protectable Trade Secret.**

28 The UTSA defines a “trade secret” as information that “[d]erives independent economic
value, actual or potential, from not being generally known to the public or other persons who can

1 obtain economic value from its disclosure or use.” Cal. Civ. Code § 3426.1(d). A trade secret
2 plaintiff “must identify the trade secrets and carry the burden of showing that they exist.” *MAI*
3 *Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 522 (9th Cir. 1993). When a party fails to
4 identify its trade secrets with particularity, summary judgment is appropriate. *Imax Corp. v.*
5 *Cinema Techs., Inc.*, 152 F.3d 1161, 1164–65 (9th Cir. 1998); *see also* Cal. Civ. Code § 2019.210
6 (trade secret plaintiff “shall identify the trade secrets with reasonable particularity”).

7 Fortinet failed to identify its trade secrets with any reasonable particularity. After 17
8 months of litigation and two false starts,² Fortinet served its Second Supplemental Identification
9 of Trade Secrets Pursuant to Cal. Code of Civ. Proc. § 2019.210 (the “2019.210 Statement”).³
10 Ex. 1. The 2019.210 Statement contains eight broad categories of information that Fortinet
11 claims are its trade secrets, including things like “[i]nformation and compilations concerning
12 Fortinet’s former, present, and prospective employees” and “[a]ll trade secret information
13 contained in Fortinet’s password-protected Salesforce database.” Ex. 1 at 1, 4. Knowing that was
14 not good enough, Fortinet also listed 136 documents by Bates number in its 2019.210 Statement.
15 Later, after obtaining discovery from Sophos and the Former Fortinet Employees,⁴ Fortinet
16 created an exhibit for one of its expert reports listing 187 new documents that it claims were
17 “retained or accessed” by the Former Fortinet Employees. For the reasons that follow, Fortinet
18 has not proven that any of this information constitute a trade secret under the UTSA.

19 **1. Fortinet Cannot Define Its Alleged Trade Secrets Using Broad,**
20 **Generic Categories.**

21 The Court should reject Fortinet’s attempt to define its alleged trade secrets using broad,
22 generic categories. California courts have held that broad, generic categories of information are

23 _____
24 ² Fortinet served its initial 2019.210 Statement on August 5, 2014 and its First Supplemental
2019.210 Statement on September 8, 2014.

25 ³ Sophos accepted Fortinet’s 2019.210 Statement so the parties could finish discovery, but
26 Sophos believed then (and discovery has borne out this belief) that the 2019.210 Statement did
not and does not properly identify any alleged trade secrets. Sophos therefore reserved its right to
challenge the sufficiency of Fortinet’s disclosure of its alleged trade secrets for all other purposes,
including through this summary judgment motion. Ex. 2.

27 ⁴ The “Former Fortinet Employees” are: Michael Valentine, Kendra Krause, Rob Gattis, Craig
28 Bradshaw, Dave DeHaven, Jason Clark, Ryan Archer, Jason Acosta, Dean Shroll, Ben Ellering,
and Dolph Smith.

1 insufficient to establish the existence of trade secrets. *See Imax Corp. v. Cinema Technologies,*
2 *Inc.*, 152 F.3d 1161, 1167-68 (9th Cir. 1988). In *Imax*, the Ninth Circuit affirmed a grant of
3 summary judgment against the plaintiff where the plaintiff claimed trade secrets in the design a
4 film projector, but failed to specify “the precise numerical dimensions and tolerances with
5 sufficient particularity.” The plaintiff’s failure to specifically identify the dimensions and
6 tolerances meant that the Court and the trier of fact would be unable to distinguish the plaintiff’s
7 trade secrets from other systems, and that the defendant “could not be expected to prepare its
8 rebuttal to Imax’s trade secrets claim.” *Id.* at 1167-68. The court’s holding in *Imax* is consistent
9 with other cases holding that identifying broad categories of information without specifics is not a
10 sufficient identification of a trade secret. *See Social Apps, LLC v. Zynga, Inc.*, No. 4-11-CV-
11 04910 YGR, 2012 WL 2203063, at *4 (N.D. Cal. June 4, 2012) (“description of the category, or
12 even of the subcategories of information within a category, does not comply with the requirement
13 to identify the actual matter that is claimed to be a trade secret”); *Agency Solutions.Com LLC v.*
14 *TriZetto Group, Inc.*, No. CV F 11-1014, AWI 2011 WL 4084702, at *11 (E.D. Cal. 2011)
15 (“ideas and broad conceptualizations are not trade secrets”); *Silvaco Data Sys. v. Intel Corp.*, 184
16 Cal. App. 4th 210 (2010), *overruled on other grounds by Kwikset Corp. v. Superior Court*
17 *(Benson)*, 51 Cal. 4th 310, 337 (2011) (trade secret identification insufficient where it “[did] not
18 designate information as such but rather describes various features, functions, and characteristics
19 of the design and operation of ... [the] software products” at issue).

20 Fortinet’s 2019.210 Statement here contains the generic descriptions of information in
21 categories and subcategories that California courts have found to be improper. For example,
22 Fortinet’s 2019.210 Statement includes the generic category of “All trade secret information
23 contained in Fortinet’s password-protected Salesforce database,” and provides generic sub-
24 category entries such as “dashboards displaying summaries of sales, financial information,
25 opportunities and forecasts,” “customizable reports of sales and opportunities,” “reports and
26 summaries from ‘Opportunities’ tab in Salesforce interface,” “records of accounts,” “SalesForce
27 Chatter pages,” “records of marketing campaigns,” “reports pertaining to special pricing
28 requests,” and “customer and partner leads.” Ex. 1 at pp. 1-3. Although these entries describe

1 certain types of document and references broad categories of information within such documents,
2 it does not sufficiently explain what in the documents is supposedly a trade secret.

3 Indeed, Fortinet does not identify a single specific document or piece of information in
4 any of these broad categories. Although Fortinet goes on to identify various sub-categories that
5 these top-level categories “include” (for example, it identifies “employee skill-sets” and
6 “employee preferences” as sub-categories of Category 3(c) regarding information about Fortinet’s
7 employees), none of those sub-categories identify the actual trade secret information supposedly
8 at issue in this case either. What Fortinet has submitted instead is a hodge-podge that variously
9 identifies dozens of broad categories of documents (e.g., “inventory reports”) and generic
10 concepts (e.g., “employee preferences”), calling them all “trade secrets” and making no effort to
11 distinguish any information as a true trade secret. Such broad identification, in direct conflict
12 with the particularity requirements of Section 2019.210, would allow Fortinet to claim as a trade
13 secret nearly any information related in any possible way to its sales process, including any
14 “proprietary,” “confidential,” or “non-public” information “contained in its Salesforce database,”
15 about its “customers,” “partners,” “employees,” “products,” or “how it markets its products
16 versus Sophos.” This violates the letter and spirit of Section 2019.210.

17 Section 2019.210 is not merely a discovery rule. Rather, it serves several important
18 purposes:

19 First, it promotes well-investigated claims and dissuades the filing
20 of meritless trade secret complaints.

21 Second, it prevents plaintiffs from using the discovery process as a
22 means to obtain the defendant's trade secrets.

23 Third, the rule assists the court in framing the appropriate scope of
24 discovery and in determining whether plaintiff's discovery requests
25 fall within that scope.

26 Fourth, it enables defendants to form complete and well-reasoned
27 defenses, ensuring that they need not wait until the eve of trial to
28 effectively defend against charges of trade secret misappropriation.

29 *Advanced Modular Sputtering Inc. v. Sup. Ct.*, 132 Cal. App. 4th 826, 8333-34 (2005) (*quoting*
30 *Computer Econ., Inc. v. Gartner Group, Inc.*, 50 F. Supp. 2d 980, 985 (S.D. Cal. 1999) (emphasis
31 and line breaks added; internal citations omitted). In short, the identification of trade secrets

1 serves to set the boundaries, not just for discovery, but for the case as a whole, so that everyone
2 knows what information is at issue, and against what the defendant must defend.

3 Fortinet's attempt to define its alleged trade secrets by generic categories has already
4 come under scrutiny in this District. On August 25, 2015, Magistrate Judge Grewal granted a
5 motion for protective order filed by FireEye, Inc. in a case with an eerily similar fact pattern to
6 this one. There, as here, Fortinet sued FireEye after several employees left Fortinet to join
7 FireEye. *Fortinet, Inc. v. FireEye, Inc.*, No. 3:13-cv-02496-HSG-PSG, Dkt. No. 71. There, as
8 here, Fortinet sued its competitor for patent infringement and trade secret misappropriation,
9 claiming that the former Fortinet employees took trade secrets to FireEye. *Id.* There, as here,
10 Fortinet has been unable to identify any of its alleged trade secrets with particularity. At the
11 hearing on the motion, Judge Grewal granted the motion for protective order and openly
12 questioned whether Fortinet even had a Rule 11 basis to file a trade secret claim against FireEye:

13 THE COURT: How do you satisfy 2019 if you don't know what
14 they took?

15 MR. NEUKOM: Primarily, your honor, by identifying the
16 Salesforce database.

17 THE COURT: Okay. So what within the Salesforce database did
18 they take?

19 MR. NEUKOM: It's impossible for us to know.

20 THE COURT: Then that means you don't know, which means you
21 don't have a trade secret claim.

22 MR. NEUKOM: If I may try an analogy, your honor?

23 THE COURT: How about trying a specific compilation or
24 document that you think they took? I'm just asking for an
25 allegation at this point that, under Rule 11, you're comfortable
26 representing to this Court that you believe they took.

27 Ex. 3, *Fortinet, Inc. v. FireEye, Inc.*, No. 3:13-cv-02496-HSG-PSG, 8/25/15 Hrg Tr. at 31:15-
28 32:4. Judge Grewal continued:

THE COURT: Yeah. You're saying your six-page 2019 statement
lists all kinds of examples of what you're claiming as a trade secret
in this case. I'm saying, show me one. Give me one example of
what you're willing to say, under Rule 11, is a trade secret that
we're claiming and that they took.

1 MR. NEUKOM: Oh, we would be happy to lodge under seal with
2 the court a handful of examples from the Salesforce database.

3 THE COURT: And you're saying that you believe, under Rule 11,
4 that they took those trade secrets? It's not just that you're claiming
5 them as trade secrets. It's that you believe that they took them.

6 MR. NEUKOM: Not those specific documents, and I'll be the first
7 to admit that, Your Honor. We just don't know.

8 *Id.* at 39:8-40:6.

9 The same thing is at work in this case—Fortinet has alleged its trade secrets using generic,
10 malleable language, to make identification of the precise information Fortinet alleges to be its
11 trade secrets impossible to discern. The Court should therefore enter summary judgment on each
12 of alleged trade secrets in Fortinet's 2019.210 Statement that is expressed in broad, generic
13 language—namely, the information identified in Category 1 (“All trade secret information
14 contained in Fortinet's password-protected Salesforce database”); Category 2 (“All non-public,
15 confidential information pertaining to reseller Ingram Micro”); Category 3 (“Information and
16 compilations concerning Fortinet's former, present and prospective employees”);⁵ Category 4
17 (“Information and compilations of information about Fortinet's current, former and prospective
18 customers, customer relationships and end-users”);⁶ Category 5 (“Information and compilations
19 of information about Fortinet's current, former and prospective partners, distributors, wholesalers,
20 value-added re-sellers, and downstream companies in the sales channel”);⁷ Category 6 (“Non-
21 public information and compilations of information about Fortinet's products”);⁸ Category 7
22 (“Information contained in Fortinet's ‘E-Staff’ reports”);⁹ and Category 8 (“Proprietary and
23 confidential information and compilations of information about how Fortinet markets its products
24 versus Sophos products”).¹⁰ *See W.L. Gore & Assoc., Inc. v. GI Dynamics, Inc.*, 872 F. Supp. 2d

25 ⁵ Fortinet only identified two specific “Reseller Reports” in Category 3(a).

26 ⁶ Fortinet only identified 32 specific reports in Category 4(a), and only 5 reports in 4(b).

27 ⁷ Fortinet only identified 69 specific Point of Sale (“POS”) reports in Category 5(a), and only
28 two specific Special pricing authorizations in 5(b).

⁸ Fortinet only identified two specific “Inventory reports” in Category 6(a), two specific
marketing reports in 6(d), 15 “Confidential price lists” in 6(e), and one Bates range of
“competitive intelligence” documents in 6(f).

⁹ Fortinet only identified one specific “E-Staff” report in Category 7.

¹⁰ Fortinet only identified the same Bates range of documents in Category 8 as it did for Category
6(f).

1 883, 898 (2012) (summary judgment warranted on individual trade secrets when there is no
2 sufficient evidence to support a claim based on that particular secret).

3 **2. Fortinet Has Not Proven That The 136 Documents Listed By Bates**
4 **Number In Its 2019.210 Statement Are Trade Secrets.**

5 Fortinet also has not proven that any of the 136 documents identified by Bates number in
6 its 2019.210 Statement actually qualifies as a trade secret. Simply referring to a range of
7 documents without identifying what exactly in those documents constitutes the plaintiff's trade
8 secret is insufficient to identify the secret with particularity, making summary judgment
9 appropriate. *Bunnell v. Motion Picture Assoc. of Am.*, 567 F.Supp.2d 1148, 1155 (C.D. Cal.
10 2007) (granting summary judgment). In *Bunnell*, the plaintiff had employed an associate who was
11 alleged to have "hacked" into the plaintiff's email and then sold 34 documents allegedly
12 containing the plaintiff's business information to the defendant. *Id.* at 1150-51. The plaintiff
13 attempted to identify its trade secrets simply as those 34 documents, but the court found that
14 "[p]laintiffs in this case have not identified with any measure of particularity what trade secrets
15 the documents given to MPAA contain." *Id.* at 1155.

16 Even if Fortinet had identified what information in any of these 136 documents
17 supposedly qualifies as a trade secret (which it did not), these documents still do not rise to the
18 level of trade secrets. None of the 136 documents are labeled "Trade Secret." In fact, 92 of the
19 136 documents contain no confidentiality label of any kind. Ex. 4 at 16. But most significantly,
20 Fortinet has never explained what trade secrets are supposedly hidden in these 136 documents.
21 During fact discovery, Sophos issued an interrogatory asking Fortinet to "identify all trade secrets
22 and/or confidential information Fortinet contends has been misappropriated by Sophos, including
23 identifying the person(s) from whom Sophos allegedly obtained the trade secrets or confidential
24 information, and how Sophos purportedly misused the trade secrets or confidential information."
25 Ex. 6. In response, Fortinet provided no facts—rather, it simply pointed back to its faulty
26 2019.210 Statement.¹¹ *Id.* Sophos also issued a Rule 30(b)(6) deposition topic asking for: "A

27
28 ¹¹ See, e.g., *Imax*, 152 F.3d at 1164-67 (affirming summary judgment on trade secret
misappropriation claim where interrogatories failed to adequately identify trade secrets at issue);

1 complete description of each piece of information alleged to be Fortinet Trade Secret
2 Information, including how each such piece of information allegedly is not generally known to
3 the public and/or allegedly subject to reasonable measures to maintain its secrecy.” Ex. 7. At the
4 deposition, Fortinet’s designee on trade secret-related topics refused to identify Fortinet’s alleged
5 trade secrets:

6 Q. And I’m trying to get at, what does Fortinet consider to be its
7 trade secrets?

8 A. And what I am saying is that you have been -- what we -- in --
9 under -- in the course of this litigation, I believe that designation of
10 trade secrets has been -- has been a subject of a lot of back-and-
11 forth and a lot of specific disclosure. So you have the answer to
12 your question, so I don’t know why you’re asking me.

13 Ex. 8, Nelson Depo. at 136:24-137:7.

14 Fortinet then served its expert reports on trade secret-related topics. Fortinet’s experts did
15 not offer any opinions identifying a single Fortinet alleged trade secret. *See* Ex. 9 (Kennedy
16 Report); Ex. 10 (Calandrino Report); Ex. 11 (Read Report). Rather, their opinions were limited
17 to opining that Fortinet’s “trade secret program” was adequate under the circumstances: “It is my
18 opinion that Fortinet uses reasonable measures to maintain the secrecy of its confidential
19 information given the perceived threat and trust placed in employees based upon their
20 professional roles.” Ex. 10 (Calandrino Report) at ¶ 20.

21 Because Fortinet refused at every turn to participate in discovery by identifying its alleged
22 trade secrets with particularity, summary judgment is appropriate. *Imax*, 152 F.3d at 1164-67;
23 *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 707 F. Supp. 1170 , 1177 (C.D.
24 Cal.1989) (granting summary judgment where defendant established that plaintiff had “failed to
25 inform [Defendant] or the Court precisely which trade secret it alleges was misappropriated”).
26 And Fortinet cannot cure its failure by coming forward with “evidence” at the summary judgment
27 stage—the law is clear that Fortinet cannot attempt to cure its discovery failures by citing new
28 evidence for the first time in opposing summary judgment. *Provenz v. Miller*, 102 F.3d 1478,

29 *W. L. Gore* at 898 (dismissing trade secrets claims not listed in response to interrogatory seeking
30 identification of same).

1 1483 (9th Cir. 1996); *Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 975-76 (N.D. Cal. 2006);
2 *Pixion, Inc. v. Placeware Inc.*, 421 F. Supp. 2d 1233, 1241-42 (N.D. Cal. 2005) (granting
3 summary judgment based on plaintiff's description of its trade secrets in the C.C.P. 2019(d)
4 statement, not on "further details" cited by Plaintiff for the first time in opposing the motion).

5 **3. Fortinet's New "Exhibit D" Identification Is Untimely And Also Does**
6 **Not Identify Any Alleged Trade Secrets.**

7 Fortinet's latest attempt to identify its alleged trade secrets comes in the form of an exhibit
8 to the report of one its experts, Dr. Patrick Kennedy. In Exhibit D to his report, Dr. Kennedy
9 identifies 189 unique (*i.e.*, non-duplicative) documents that Fortinet claims were "accessed or
10 retained by" the Former Fortinet Employees. Ex. 9, Kennedy Report, Ex. D thereto. Notably,
11 neither Dr. Kennedy nor Fortinet claims that any of these documents constitute or contain an
12 alleged Fortinet trade secret, so summary judgment is warranted on that basis alone.

13 However, the "Exhibit D" identification of documents fails to support Fortinet's trade
14 secrets claim for several other reasons. First, 187 of these documents do not appear in Fortinet's
15 2019.210 Statement (nor are they listed in response to Sophos's interrogatory), and therefore were
16 not properly identified as alleged trade secrets. *Imax*, 152 F.3d at 1164-67 (affirming summary
17 judgment on trade secret claim where interrogatories failed to adequately identify trade secrets);
18 *W. L. Gore*, 872 F. Supp. 2d at 898 (dismissing trade secrets claims not listed in response to
19 interrogatory seeking identification of same). Second, a significant amount of these documents
20 are Sophos business records, not Fortinet's. *See* Ex. 9 at Ex. D. Third, Exhibit D appears to be
21 Fortinet's (failed) effort to "reverse engineer" its trade secrets, which is not permitted under the
22 law of this District. As Judge Alsup observed just last year:

23 Experience has shown that it is easy to allege theft of trade secrets
24 with vagueness, then take discovery into the defendants' files, and
25 then cleverly specify whatever happens to be there as having been
26 trade secrets stolen from plaintiff. A true trade secret plaintiff
27 ought to be able to identify, up front, and with specificity the
28 particulars of the trade secrets without any discovery. This order
will not allow this old trick of vague pleading with the blanks to be
artfully filled in only after discovery.

1 *Jobscience, Inc. v. CVPartners, Inc.*, No. C 13–04519-WHA, 2014 WL 852477 at *5 (N.D. Cal.
2 Feb. 28, 2014).

3 In short, Fortinet has failed at every turn to identify its alleged trade secrets with the
4 particularity required to survive summary judgment. *Imax Corp. v. Cinema Technologies, Inc.*,
5 152 F.3d 1161, 1167-68 (9th Cir. 1988). The Court should enter judgment for Sophos.

6 **B. Summary Judgment Is Warranted Because Fortinet Has Not Proven That Its**
7 **Purported Trade Secrets Were The Subject of Reasonable Efforts To**
8 **Maintain Their Secrecy.**

9 Not surprisingly, no genuine issue of material fact exists on the next element of Fortinet’s
10 trade secret claim—that its (unidentified) trade secrets were the subject of reasonable efforts to
11 maintain their secrecy. “A trade secret may only exist if: (1) reasonable steps were taken to
12 maintain its secrecy, and (2) the information alleged to be a trade secret is not generally known to
13 the public or people who can obtain economic value from its use.” *HiRel Connectors, Inc. v.*
14 *United States*, No. CV01–11069 DSF, 2006 WL 3618011 at *6 (C.D. Cal. Jan. 25, 2006), citing
15 Cal. Civ. Code § 3426.1(d); *Religious Tech. Center v. Netcom On–Line Comm. Servs., Inc.*, 923
16 F. Supp. 1231, 1250 (N.D. Cal. 1995); *Morton v. Rank America, Inc.*, 812 F. Supp. 1062, 1075
(C.D. Cal. 1993). Here, Fortinet cannot prove either of the elements identified in *HiRel*.

17 **1. Fortinet Has Not Made Reasonable Efforts To Maintain the Secrecy**
18 **Of Its Purported Trade Secrets.**

19 Fortinet has presented no evidence that it took “reasonable steps” to protect the specific
20 documents it is claiming to be its trade secrets. Fortinet’s expert, Dr. Calandrino, opines that “[i]t
21 is my opinion that Fortinet uses reasonable measures to maintain the secrecy of its confidential
22 information given the perceived threat and trust placed in employees based upon their
23 professional roles.” Ex. 10 (Calandrino Report) at ¶ 20. But Dr. Calandrino stops short of
24 opining that any of the documents discussed above was actually subject to reasonable steps to
25 maintain their secrecy. There is a good reason he does not offer that opinion—because the
26 documents in question were not subject to any measures to maintain their secrecy. The following
27 facts are material and undisputed:

1 • Seven of the Former Fortinet Employees testified that they were permitted—even
2 encouraged—to use their personal computers to conduct Fortinet business. Ex. 12, Acosta
3 10/10/14 Depo. at 87:20-88:21; Ex. 15, Valentine 9/3/15 Depo. at 36:8-37:13; Ex. 16, Krause
4 10/2/14 Depo. at 34:13-35:8; Ex. 17, Krause 8/19/15 Depo. at 149:5-15; Ex. 18, Gattis 8/28/15
5 Depo. (Rough) at 12:15-13:8; Ex. 19, DeHaven 8/28/15 Depo. (Rough) at 5:19-6:8; Ex. 20, Clark
6 10/8/14 Depo. at 303:7-304:5; Ex. 23, Archer 8/26/15 Depo. at 12:23-15:14. This is why these
7 employees ended up having Fortinet data on their personal computers—because they maintained
8 those documents on their personal computers in the ordinary course of their jobs at Fortinet.

9 • Because Fortinet does not have protocols for identifying materials that may
10 contain sensitive information, Fortinet employees generally mark everything they generate as
11 “Fortinet Confidential” or similar words. A simple Google search for the words “Fortinet
12 confidential” returns 536 documents labeled “Fortinet Confidential” on publicly accessible
13 websites, including on Fortinet’s own public website. Ex. 4, Tippit Report at 14-15, 21; Ex. 5.
14 These documents include public presentations given by Fortinet’s CEO, presentations made by
15 Fortinet’s partners, and information about Fortinet’s products. Ex. 4, Tippit Report at 21, 23, 24.

16 • One Former Fortinet Employee, Ryan Archer, testified that Fortinet allowed
17 roughly 30-40 Fortinet employees to share a single password to access Fortinet’s Salesforce
18 database—the very database that Fortinet claims contains many of its purported trade secrets. Ex.
19 23, Archer Depo. at 58:4-59:4.

20 **2. Fortinet Failed To Show That Its Purported Trade Secrets Are Not** 21 **Generally Known Or Readily Ascertainable.**

22 A trade secret requires proof of “independent economic value, actual or potential, from
23 not being generally known to the public or to other persons who can obtain economic value from
24 its disclosure or use.” UTSA § 3426.1(d)(1). Fortinet also bears the burden at this stage to show
25 that its alleged trade secrets are not generally known or readily ascertainable, and its failure to do
26 so warrants summary judgment. *See W. L. Gore*, 872 F.Supp.2d 883, 900 (“Furthermore, GID
27 has presented no evidence that Trade Secrets 7 and 19 were not generally known, and claims
28 regarding those secrets are dismissed”); *see also HiRel Connectors, Inc. v. United States*, No.

1 CV01-11069 DSF, 2005 WL 4958547 at *6 (C.D. Cal. Jan. 4, 2005) (“Even if reasonable steps
2 had been taken, Plaintiff cannot bring a suit for misappropriation unless it can also show that the
3 information alleged to be a trade secret is not generally known or readily ascertainable.”)

4 Not only has Fortinet failed to present any evidence that any of its alleged trade secrets
5 were not generally known or were not readily ascertainable, but the uncontroverted evidence
6 shows that the public Internet is awash with hundreds of Fortinet’s alleged “confidential”
7 documents, that are readily accessible through simple Google searches. Ex. 4, Tippit Report at
8 14-15, 21; Ex. 5. Once trade secrets have been exposed to the public, they cannot later be
9 recalled. *Religious Tech. Center v. Netcom Online Comm’n Svcs Inc.*, 923 F. Supp. 1231, 1254
10 (N.D. Cal. 1995); *see also id.* at 1256 (“posting works to the Internet makes them ‘generally
11 known’ ”). Further, a trade secret loses its status as a secret when it is made available to the
12 members of the relevant industry. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984)
13 (information that is generally known in an industry not a trade secret); *see also DVD Copy
14 Control Ass’n v. Bunner*, 116 Cal. App. 4th 241, 251 (2004) (information is not a secret if it has
15 become generally known to potential competitors); *Hilderman v. Enea Teksci, Inc.*, 551
16 F.Supp.2d 1183, 1199 (S.D. Cal. 2008) (granting summary judgment on certain aspects of trade
17 secret claim where contested information was in the public domain and not a trade secret).

18 Further, Fortinet’s retail prices, and even its discounted prices, are generally known in the
19 industry, as they are available on several websites, including
20 <http://www.virtualgraffiti.com/Partner/Fortinet> and www.avfirewalls.com. Many of the Former
21 Fortinet Employees have testified that Fortinet’s price lists and pricing structure is easily found
22 online. Ex. 12, Acosta 10/10/14 Depo. at 91:18-92:4; 93:24-94:4; Ex. 13, Acosta 8/24/15 Depo.
23 at 37:16-38:7; Ex. 14, Valentine 10/6/14 Depo. at 262:12-263:12; Ex. 16, Krause 10/2/14 Depo.
24 at 39:23-41:2; Ex. 17, Krause 8/19/15 Depo. at 145:6-148:5; Ex. 20, Clark 10/8/14 Depo. at
25 331:7-332:9; Ex. 21, Clark 6/16/15 Depo. at 147:23-150:14; Ex. 22, Archer 9/23/14 Depo. at
26 271:17-272:6. Fortinet’s price lists, therefore, are also not protectable trade secrets. Thus, any
27 and all information which Fortinet claims as “confidential” cannot be a trade secret once it has
28 been publically disclosed. Sophos is entitled to summary judgment on this independent basis.

1 **C. Summary Judgment Is Warranted Because Fortinet Has Not Proven That**
2 **Sophos Misappropriated Any Alleged Fortinet Trade Secret.**

3 Summary judgment is warranted because Fortinet has failed to come forward with any
4 facts whatsoever that Sophos misappropriated any alleged Fortinet trade secret. *Mintz v. Mark*
5 *Bartelstein and Assoc. Inc.*, 906 F.Supp.2d 1017, 1038 (C.D. Cal. 2012) (granting summary
6 judgment where record was “utterly devoid” of any evidence of misappropriation); *see also*
7 *Brookhaven Typesetting Services, Inc. v. Adobe Systems, Inc.*, No. C-01-20813 RMW, 2007 WL
8 2429653 at *10-11(N.D. Cal. Aug. 24, 2007) (granting summary judgment where plaintiff failed
9 to produce any evidence that defendant misappropriated plaintiff’s alleged trade secrets); *Aldrich*
10 *Supply Co., Inc. v. Hanks*, 2007 WL 30309, at *12 (Cal. App. 4 Dist.) (affirming summary
11 judgment where plaintiff failed to show that customer list and other information was a trade
12 secret, or that the information was misappropriated).

13 “To find misappropriation, California courts require that the trade secret be used by the
14 Defendant or disclosed by the Defendant to a third party.” *Globespan, Inc. v. O’Neill*, 151
15 F.Supp.2d 1229, 1235 (C.D. Cal. 2001) (citing Cal. Civil Code § 3426.1(b), defining
16 “misappropriation”); *see also Bayer Corp. v. Roche Molecular Systems, Inc.*, 72 F.Supp.2d 1111,
17 1120 (N.D. Cal. 1999) (“California trade-secrets law does not recognize the theory of inevitable
18 disclosure; indeed, such a rule would run counter to the strong public policy in California
19 favoring employee mobility. A trade-secrets plaintiff must show an actual use or an actual
20 threat.”); *PMC, Inc. v. Kadisha*, 78 Cal. App.4th 1368, 1383 (2000) (“Use of a trade secret
21 without knowledge it was acquired by improper means does not subject a person to liability
22 unless the person receives notice that its use of the information is wrongful.”).

23 Here, Fortinet’s trade secret misappropriation claims against Sophos fails because Fortinet
24 has not produced any evidence that Sophos acquired any alleged Fortinet trade secret or did so
25 through “improper means.”¹² Indeed, the fact that a document is marked “Fortinet Confidential”
26 does not make that document a trade secret, and the fact that many hundreds of documents

27 ¹² “‘Improper means’ includes theft, bribery, misrepresentation, breach or inducement of a breach
28 of a duty to maintain secrecy, or espionage through electronic or other means. Reverse
engineering or independent derivation alone shall not be considered improper means.” Cal. Civ.
Code § 3426.1(a).

1 marked “Fortinet Confidential” are available on the Internet demonstrates that any given
2 document could have been obtained by legitimate means.

3 **1. Fortinet Has No Evidence That Sophos Used Or Disclosed A Fortinet**
4 **Trade Secret.**

5 Fortinet must come forward with evidence that Sophos used or disclosed a Fortinet trade
6 secret. It has not and cannot do so. All Fortinet can point to is the fact that there are certain
7 Fortinet documents residing on various computers of the Former Fortinet Employees. That does
8 not equate to use by Sophos of these documents, let alone use of trade secrets by Sophos.

9 Sophos does not dispute that certain Former Fortinet Employees retained Fortinet data on
10 their personal computers when they left Fortinet. They did. And they did because Fortinet
11 permits its employees to use their personal computers for business purposes, and does not take
12 steps to ensure that an employee who leaves the company actually returns or destroys the data on
13 their personal computers. But Fortinet cannot demonstrate that Sophos acquired any alleged
14 Fortinet trade secret with knowledge that the trade secret “was acquired by improper means”
15 under the UTSA. Indeed, Fortinet can point to only three instances of a Former Fortinet
16 Employee accessing and using a Fortinet document in conjunction with his or her work at
17 Sophos, and none of them come anywhere close to misappropriation of a Fortinet trade secret.

18 First, Jason Acosta testified that he looked at a Fortinet “Battlecard”¹³ while he was at
19 Sophos, proofreading existing Sophos documents. Ex. 13, Acosta Depo. at 39:14-24, 40:24-
20 41:17. However, Mr. Acosta testified that all of the information on that Fortinet Battlecard could
21 be found publically. *Id.* Indeed, with a simple Internet search, one can find dozens of Fortinet
22 Battlecards online. Ex. 5; Ex.13, Acosta Depo. at 202:14-205:18. Further, Fortinet did not
23 identify any Battlecards on its 2019.210 Statement or in response to Sophos’s trade secret
24 interrogatory, so it has no trade secret claim for these documents anyway. Second, Kendra
25 Krause testified that she accessed a Fortinet price list because it was “quicker,” but that she could
26 have just as easily found the same information online. Ex. 17, Krause Depo. at 145:6-148:5.

27 _____
28 ¹³ A “Battlecard” is a sheet that is used to show how one company’s product is better than a
competitor’s product.

1 Third, Rob Gattis testified that he accessed a Fortinet spreadsheet, but only did so to get the
2 formulas, and did not use any of the actual Fortinet data. Ex. 18, Gattis Depo. at 169:8-170:14.

3 The other Former Fortinet Employees have testified that (a) they have not used Fortinet
4 confidential information in their work at Sophos; (b) the information they did retain would not
5 have been helpful to them at Sophos even if they had looked at it; or (c) the information Fortinet
6 is concerned about is publically available in various forms. Ex. 12, Acosta 10/10/14 Depo. at
7 92:25-94:4; Ex. 13, Acosta 8/24/15 Depo. at 37:16-38:7; 37:16-39:12; 39:14-24; 40:24-41:17;
8 47:18-48:2; 159:5-17; Ex. 14, Valentine 10/6/14 Depo. at 270:23-271:18; Ex. 15, Valentine
9 9/3/15 Depo. at 63:3-64:11; Ex. 16, Krause 10/2/14 Depo. at 43:2-44:14; 126:24-129:1; Ex. 17,
10 Krause 8/19/15 Depo. at 144:1-8; Ex. 18, Gattis 8/28/15 Depo. (Rough) at 41:17-42:5; 54:3-11;
11 143:4-23; Ex. 20, Clark 10/8/14 Depo. at 329:18-332:9; Ex. 21, Clark 6/16/15 Depo. at 139:9-
12 140:20; 147:23-149:13; Ex. 23, Archer 8/26/15 Depo. at 32:3-35:21; Ex. 24, Ellering 9/25/14
13 Depo. at 268:24-270:5; Ex. 25, Ellering 8/20/15 Depo. at 59:18-60:17; Ex. 26, Shroll 8/28/15
14 Depo. (Rough) at 16:7-22; Ex. 27, Smith 9/30/14 Depo. at 230:9-231:5; 234:6-16; Ex. 28, Smith
15 8/25/15 Depo. at 51:17-52:7; 73:20-74:23. The only information Fortinet can point to as being
16 even remotely useful to the Former Fortinet Employees in their jobs at Sophos is (1) Fortinet
17 pricing information, which is readily available from public sources, and (2) product information
18 used to compare how Fortinet's products work versus Sophos's products. All of this information
19 is also widely publically available, which means it is not a trade secret. *Religious Tech. Center*,
20 923 F. Supp. at 1254-1256.

21 Even Fortinet's experts cannot opine that any Fortinet document (let alone a Fortinet trade
22 secret) was actually accessed and used by the Former Fortinet Employees. Fortinet's forensics
23 expert, Mr. Read, admits that the "last access date" from a document's metadata does not
24 necessarily indicate that the access was done by a human being: "[t]he Last Accessed Date in the
25 Active, Deleted, and Deleted User Files Reports identifies when a file was last accessed, which
26 could be either because of interaction by the user, or some system process. However, in recent
27 versions of Windows, the Last Accessed Date, by default, is not updated when a user accesses a
28 file." Ex. 11, Read Report at ¶ 20. Mr. Read opined that "additional artifacts of file access may

1 be used to corroborate the time a user last accessed, or opened, a file,” *id.*, but as Sophos’s
2 forensic expert confirmed, the additional artifacts used by Mr. Read do not prove that any of the
3 files were actually accessed. Ex. 29, French Report at ¶ 17.

4 Simply put, despite repeated depositions of the Former Fortinet Employees, despite the
5 production of hundreds of thousands of documents in this case, and despite having the full
6 forensic images of the Former Fortinet Employees’ Sophos-issued and personal computers,
7 smartphones, and tablets, Fortinet is unable to produce any admissible evidence that Sophos
8 misappropriated any alleged Fortinet trade secret. Summary judgment is warranted.

9 **2. Fortinet Cannot Show That Sophos Did Not Independently Derive The**
10 **Alleged Trade Secret Information.**

11 Fortinet has the burden of establishing that Sophos did not independently derive the
12 alleged trade-secret information. *Sargent Fletcher, Inc. v. Able Corp.*, 110 Cal. App. 4th 1658,
13 1669 (2003); *see also Rita Medical Systems, Inc. v. Resect Medical, Inc.*, No. C 05–03291 WHA,
14 2007 WL 161049, *8 (N.D. Cal. Jan. 17, 2007) (granting summary judgment on trade secret
15 misappropriation claim where plaintiff could not establish that defendant independently derived
16 list of overlapping customers). The facts in *Rita Medical* are very similar to the facts in this case.
17 In *Rita Medical*, the court noted that “[t]his case presents a familiar fact pattern: an employee
18 leaves one company for another and is accused by the first of stealing trade secrets and other
19 company assets.” 2007 WL 161049 at *1. The plaintiff accused the departing employee of,
20 among other things, removing and copying work related files, including the plaintiff’s customer
21 list. *Id.* at *2. The court, noting that “plaintiff has the burden of establishing that defendants did
22 not independently derive trade-secret information,” found that “[t]he sum of the evidence Rita
23 presents in support of this claim shows that Resect and Rita had some customers in common, but
24 falls short of excluding independent derivation.” *Id.* at *8. After the defendant provided
25 evidence that he had previously obtained contact information for the overlapping clients, the court
26 found that “no reasonable juror could find that Resect and Daniel did not independently derive
27 their customer list” and granted defendants’ motion for summary judgment. *Id.* at *8.

1 Not only has Fortinet failed to establish that Sophos has not independently derived the
2 information it claims as trade secret, but the evidence demonstrates that Sophos obtained any
3 purportedly “confidential” Fortinet information from public sources. Fortinet’s speculation that
4 Sophos “must have” misappropriated its trade secrets is not enough to survive summary
5 judgment. *Excelligence Learning Corp. v. Oriental Trading Co., Inc.*, 2004 WL 2944048, at *8
6 (N.D. Cal. Dec. 20, 2004). In *Excelligence Learning*, the plaintiff accused its recently departed
7 employee of misappropriating knowledge of sales, pricing and cost information for products
8 offered in its catalog that allowed the employee to “cherry-pick” that catalog’s best sellers for use
9 in a similar catalog she was in charge of creating for her new employer. 2004 WL 2944048 at *1,
10 *4. The plaintiff asserted that the employee “*must* have taken copies of master catalogs or other
11 financial information when she left,” asserting there was no other way to account for her rapid
12 creation of the new catalog and the overlap in the products. *Id.* at * 6 (emphasis in original). The
13 plaintiff contended that 90% of the products in the new catalog also appeared in its catalog, and
14 that 90% of those overlapping products were its best sellers. *Id.* at *7. The court state that “[a]t
15 first blush, this statement appears rather damning,” *id.*, but upon closer examination of the
16 plaintiff’s statistics, found “serious questions” as to how the plaintiff actually calculated its
17 numbers. *Id.* The court granted summary judgment of no misappropriation, finding that “[w]hat
18 appears initially to be a colorable claim based upon statistical analysis and other circumstantial
19 evidence appears upon closer examination to be nothing more than speculation fueled by Elliot’s
20 obvious and intense dislike of Martini.” *Id.* at *8.

21 This is the case here. Fortinet’s intense dislike of the fact that its employees would rather
22 work at a competitor such as Sophos has caused Fortinet to speculate that those employees “must
23 have” misappropriated trade secrets. This is not enough to survive summary judgment.

24 **D. Summary Judgment Is Warranted Because Fortinet Has Not Proven Any**
25 **Damages.**

26 Finally, Fortinet has not proven it suffered any actual loss from any alleged
27 misappropriation by Sophos, or that Sophos was unjustly enriched as a result of any alleged
28 misappropriation. Thus, summary judgment is appropriate. *See U.S. Auto Parts Network, Inc. v.*

1 *Parts Geek, LLC*, 494 Fed. Appx. 743, 744 (9th Cir. 2012) (partially affirming grant of summary
2 judgment where there was no evidence that use of trade secrets damaged plaintiff); *Integral*
3 *Development Corp. v. Viral Tolat and Does 1-20*, C 12-06575 JSW, 2014 WL 721844, at *4
4 (N.D. Cal. Feb. 24, 2014) (granting summary judgment because “even if Integral had met its
5 burden to identify a legally cognizable trade secret and had produced evidence of
6 misappropriation, the Court also finds Integral cannot prevail on its CUTSA claim as it has not
7 demonstrated that it has suffered damages as a result of any alleged misappropriation.”).

8 Fortinet’s claim for damages is limited to its contentions in response to Sophos’s
9 Interrogatory No. 16, which required Fortinet to explain in detail the damages it suffered as a
10 result of Sophos’s alleged misappropriation of Fortinet’s trade secrets. Ex. 6, Response to
11 Interrogatory No. 16. But in its response, Fortinet failed to identify a single sale or opportunity
12 lost to Sophos because of the misappropriation of an alleged trade secret, failed to identify a
13 single document evidencing damages, and failed to identify any witness testimony supporting its
14 claim for damages. *Id.* Instead, Fortinet merely stated that it intends to seek damages under
15 broad theories such as unjust enrichment, compensatory damages, reasonable royalty damages, or
16 the costs incurred by Fortinet to develop and maintain as confidential the stolen trade secrets. *Id.*
17 This is insufficient. See *Integral Development Corp.*, 2014 WL 721844, at *4.

18 This is not surprising because the evidence is to the contrary. Fortinet’s stock price, for
19 example, has more than doubled since this lawsuit was filed. Ex. 30. And Fortinet has produced
20 no evidence of lost customers or business opportunities as a result of any alleged
21 misappropriation. Summary judgment is therefore appropriate because Fortinet has failed to
22 establish any damages resulting from Sophos’s alleged misappropriation of Fortinet’s alleged
23 trade secrets.

24 **V. SUMMARY JUDGMENT IS WARRANTED ON ALL CLAIMS ALLEGED**
25 **AGAINST MICHAEL VALENTINE AND JASON CLARK, BECAUSE THOSE**
26 **CLAIMS WERE FULLY ADJUDICATED IN ARBITRATION.**

27 Summary judgment is warranted on all claims asserted against Defendants Valentine and
28 Clark under the doctrine of *res judicata* because they either were or could have been fully
adjudicated in the JAMS arbitration. “A valid and final award by arbitration has the same effects

1 under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of
2 a court.” *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 16 (2001) (Ginsburg, J., concurring);
3 *Gallardo v. AT&T Mobility, LLC*, 937 F. Supp. 2d 1128, 1134 (N.D. Cal. Mar. 29, 2013) (“Final
4 arbitration awards can have preclusive effect,” *citing Clark v. Bear Stearns & Co.*, 966 F.2d 1318,
5 1321 (9th Cir. 1992)). Under *res judicata*, an arbitration award bars a claim if: (1) the claim in
6 question and those settled by arbitration are identical, (2) the arbitrator reached a final judgment
7 on the merits, (3) the current claim involves the same parties as those which were before
8 arbitration, and (4) the arbitrator had the authority to make a binding decision on the claim in
9 question. *Gallardo*, 937 F. Supp. 2d at 1134-35. *Res judicata* also bars those claims that could
10 have been raised in the previous action (here, the arbitration). *Allen v. McCurry*, 449 U.S. 90, 94
11 (1980).

12 Here, all four conditions are satisfied. First, the claims asserted here and in the arbitration
13 are identical. In its First Amended Complaint, Fortinet alleged five causes of action against
14 Valentine and Clark. Dkt No. 9. Valentine moved to compel arbitration based on an arbitration
15 provision in his employment agreement with Fortinet. Dkt. No. 9, Ex. A. The arbitration clause
16 provides that the parties agree to arbitrate “any and all controversies, claims, or disputes ...
17 arising out of, relating to, or resulting from my employment with the company or the termination
18 of my employment with the company, including any breach of this agreement.” *Id.* § 12(A). The
19 clause also states that “this agreement to arbitrate also applies to any disputes that the company
20 may have with me,” and emphasizes that “arbitration shall be the sole, exclusive and final remedy
21 for any dispute between me and the company” and that “neither I nor the company will be
22 permitted to pursue court action regarding claims that are subject to arbitration.” *Id.* § 12(C). In
23 March 2014, the parties agreed to arbitrate all claims against Valentine and Clark, and the Court
24 ordered it. Dkt. No. 45. The only claim not raised in the arbitration was Count XII (Civil
25 Conspiracy), but there was no reason Fortinet could not have raised it there, thus it is now barred.
26 *Allen*, 449 U.S. at 94. Fortinet never withdrew any of those claims from arbitration or “reserved”
27 them to be litigated in this Court. Thus, every claim against Valentine and Clark is now barred.

28 Second, final judgment was reached in the arbitration on March 10, 2015. Ex. 31. The Final

1 Award disposed of all claims asserted against Valentine and Clark. *Id.* at 19-24. Third, the same
2 parties involved in the arbitration (Fortinet, Valentine and Clark) are also parties to this case.
3 Fourth, the JAMS arbitrator had the authority to make a final decision on the claims. Thus,
4 summary judgment as to all claims against Valentine and Clark is warranted.

5 **VI. FORTINET IS NOT ENTITLED TO RECOVER PRE-SUIT DAMAGES FOR**
6 **TWO OF ITS PATENTS BECAUSE FORTINET DID NOT PROVIDE ACTUAL**
7 **NOTICE TO SOPHOS.**

8 The Court should grant Sophos partial summary judgment that Fortinet may not recover
9 pre-suit damages for two of its asserted patents, United States Patent Nos. 7,333,430 (“the ’430
10 patent”) and 7,376,125 (“the ’125 patent”) because (a) Fortinet’s products practice these patents
11 and (b) Fortinet failed to mark its products with the patent numbers as required by 35 U.S.C. §
12 287. “If a patentee practices the claimed invention and fails to mark its product with the relevant
13 patent number, damages may be limited.” *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*,
14 694 F.3d 1312, 1333-34 (Fed. Cir. 2012) (citing 35 U.S.C. § 287). Under section 287, if a
15 patentee was required to mark but failed to do so, it may not recover pre-suit damages unless it
16 proves that it gave actual notice to the accused infringer and the infringement continued after
17 notice. *Id.* at 1334.¹⁴

18 The patentee bears the burden of proving its compliance with section 287. *Nike, Inc. v.*
19 *Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1446 (Fed. Cir. 1998); *Dunlap v. Schofield*, 152 U.S. 244,
20 248 (1894). However, courts appear to disagree about whether a patentee also bears the burden
21 of proving that it did not practice its own patent. *Compare WiAV Solutions LLC v. Motorola,*
22 *Inc., et al.*, 732 F. Supp. 2d 634, 640 (E.D. Va. 2010) (a patentee “bears the burden of showing
23 that it, and its licensees, were not required to mark under § 287”) *with Golden Bridge Tech., Inc.*
24 *v. Apple, Inc.*, No. 12-cv-04882-PSG, 2014 WL 1928977, at *11-12 (N.D. Cal. May 14, 2014)
25 (“the right incentive structure is set by requiring the party seeking limited damages to identify
26 unmarked products believed to practice the accused claims”). Given this split in authority,
27 Sophos identifies below the Fortinet products that practice the ’430 and ’125 patents. *Golden*

28 ¹⁴ Because the filing of a lawsuit constitutes actual notice under section 287(a), Sophos seeks
summary judgment only as to Fortinet’s claim of pre-suit damages.

1 *Bridge*, 2014 WL 1928977, at *12 fn. 97 (under court’s interpretation of burdens associated with
2 marking statute, Apple met its burden by identifying unmarked products on summary judgment).

3 Fortinet seeks pre-suit damages for Sophos’s alleged infringement of the ’430 and ’125
4 patents. Ex. 33, Kearn Report at ¶46. Thus, to be entitled to pre-suit damages, Fortinet must
5 prove that (a) it has no duty to mark its products or (b) it complied with the marking requirement.
6 *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193 (Fed. Cir. 2002). Fortinet cannot prove
7 either one.

8 **A. Fortinet Has A Duty to Mark Its Products But Failed To Do So.**

9 Despite Fortinet’s contention to the contrary,¹⁵ the evidence is undisputed that Fortinet’s
10 products practice certain claims of the ’430 and ’125 patents, and therefore Fortinet had a duty to
11 mark those products with the patent numbers. Fortinet asserts apparatus claims from the ’430 and
12 ’125 patents against Sophos. Ex. 32 (identifying claims 14-15 of the ’430 patent and claims 3-5
13 of the ’125 patent); Ex. 35-36. Sophos’s expert, Dr. Aaron Striegel, has opined that Fortinet’s
14 5000-series FortiGate appliances practice claims 14-15, 25-27, and 39 of the ’430 patent, and that
15 Fortinet’s FortiGate appliances with software version 5.2 practice claims 3 and 5 of the ’125
16 patent. Ex. 34, Striegel Decl. at ¶¶3-7, Ex. 1 thereto. His expert opinion is unrebutted. Indeed,
17 as Dr. Striegel explains, Fortinet’s corporate representatives have essentially confirmed that
18 Fortinet practices these patents. Ex. 34, Striegel Decl., Ex. 1 thereto at ¶¶ 49, 159 and 170. As a
19 result, Fortinet has a duty to mark these products with the patent numbers. *Nike*, 138 F.3d at
20 1443; *Am. Med. Sys., Inc. v. Med. Eng’g Corp.*, 6, F.3d 1523, 1538-39 (Fed. Cir. 1993) (patentee
21 required to mark when it asserted both apparatus and method claims and there was a device
22 capable of being marked).

23 It also is undisputed that Fortinet does not mark its products that practice the ’430 and
24 ’125 patents with the patent numbers. Fortinet’s corporate representative confirmed this fact:

25 Q. Does Fortinet include any of the Fortinet asserted patents, the
26 six that I named earlier, on any of its EULAs, documentations or—

27 ¹⁵ Fortinet issued an interrogatory response claiming that it “does not presently contend that its
28 products practice the Fortinet Asserted Patents.” Ex. 6 at 67. However, Fortinet offered no facts
or expert opinions to back up this contention.

1 or Fortinet products?

2 A. List the specific patent?

3 Q. Correct.

4 A. No.

5 Ex. 8, Nelson Depo. at 60:11-17. Because the evidence shows that Fortinet practices the '430 and
6 '125 patents and that Fortinet has not marked, Fortinet cannot claim pre-suit damages unless it
7 provided Sophos with actual notice of these patents before filing suit.

8 **B. Fortinet Did Not Provide Sophos Actual Notice Before Filing Suit.**

9 To show that it provided Sophos with actual notice, Fortinet must prove that it
10 communicated to Sophos “a specific charge of infringement by a specific accused product or
11 device.” *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994).
12 Thus, to satisfy the “actual notice” requirement, Fortinet must prove it provided Sophos with
13 notice of the specific Sophos activities it believed infringed the '430 and '125 patents. *Id.*
14 Fortinet has not produced any evidence that it provided Sophos with actual notice of its alleged
15 infringement of the '430 and '125 patents before filing suit, because no such evidence exists. Ex.
16 6 at pp. 60-65 (no disclosure of evidence of Fortinet providing actual notice to Sophos).

17 Accordingly, the Court should enter partial summary judgment that Fortinet may not
18 recover damages for Sophos’s alleged infringement of the '430 and '125 patents before the filing
19 of this lawsuit.

20 **VII. CONCLUSION**

21 For the foregoing reasons, Sophos respectfully requests that the Court enter summary
22 judgment on Fortinet’s claim for trade secret misappropriation (Count No. XI), all claims asserted
23 against Michael Valentine and Jason Clark (Count Nos. VII, VIII, IX, X, XII and XIII), and
24 Fortinet’s claim for pre-suit damages for the '430 and '125 patents.

1 Dated: September 7, 2015

DLA PIPER LLP (US)

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By: /s/ Sean C. Cunningham

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SEAN C. CUNNINGHAM
KATHRYN RILEY GRASSO
DAVID R. KNUDSON
TODD S. PATTERSON

5

6

Attorneys for Defendant and Counterclaim
Plaintiff SOPHOS INC. and Counterclaim
Plaintiff SOPHOS LTD.

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